SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1316

2,606.84 ACRES OF LAND IN TARRANT COUNTY, TEXAS, and FRANK CORN, ET AL., *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

R. DANIEL SETTLE
CARLISLE CRAVENS
1800 First National Bank Building
Fort Worth, Texas 76102

E. BARRETT PRETTYMAN, JR.
815 Connecticut Avenue
Washington, D. C. 20006

Attorneys for Petitioners

CARTER, HANGER, GOOCH, CRAVENS & MUNN

HOGAN & HARTSON

Of Counsel

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Petitioners, Perry R. Bass, John B. Connally and Howell E. Smith, executors of the Estate of S. W. Richardson, Deceased (the original condemnee), respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the judgment reversing the judgment of the United States District Court for the Northern District of Texas in favor of Petitioners.

CITATIONS TO OPINIONS BELOW

The District Court's opinion is reported at 309 F. Supp. 887 and is attached as Appendix B.[1] The District Court's Findings of Fact and Conclusions of Law, Petitioners' Motion for Amendments and Additions of Findings, and the District Court's Order on that Motion are all unreported but are attached as Appendix C. The District Court's Judgment is unreported but attached as Appendix D.

The opinion of the Fifth Circuit Court of Appeals is reported at 432 F.2d 1286 and is attached as Appendix E, its Judgment is attached as Appendix F, and its order denying a Petition for Rehearing is attached as Appendix G.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 16, 1970 (App. F). A timely Petition for Rehearing was filed on October 30, 1970, and was denied by order of November 9, 1970 (App. G.). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Was it not a denial of due process under the Fifth Amendment for the United States to condemn a portion of petitioner's land for the purpose of creating a recreational area when (a) the governing statute authorized "navigation, flood control, and allied purposes" and not a taking for recreation; (b) the Corps of Engineers deliberately kept its recreational purpose secret, even to the point of changing descriptive phrases so as to hide the true nature of the taking; (c)

[1] All Appendices have been printed under separate cover.

the Corps resisted discovery for thirteen years in order to prevent the purpose of the condemnation from being revealed, and (d) a number of additional steps were taken to mislead the public and the court as to the true purpose of the condemnation?

2. (a) Is a District Court precluded from finding that the true purpose of a condemnation is one outside the statutory authority when the record shows what the actual purpose was and that it was not authorized by the governing statute?

(b) Can the Secretary of the Army's certification of the purpose of condemnation be used by the Government as an impenetrable shield to deny the landowner the opportunity to show that his constitutional right of due process is being violated by an unauthorized taking of his land?

3. Even if a landowner must show "pervasive deception, unreasoned decision, or will-of-the-wisp determination" on the part of the condemning authority, was not this test met where, as the District Court found, the Corps of Engineers concealed the facts, changed facts for public consumption, made recommendations "tainted by * * * impropriety," misstated the real purpose of its action, and otherwise acted in an arbitrary and capricious manner in excess of its authority?

4. Under the facts of this case, was not the project as built so radically different from the one authorized by Congress in location, cost, size, construction, specifications and design as to be an unauthorized project?

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution, Public Law 14 (Act of March 2, 1945, Pub. L. No. 79-14, § 2, 59 Stat. 10), and 33 U.S.C. §§ 701, 701b-4, 701b-8 and 701m are attached as Appendix A.

STATEMENT

This case represents a long and disgraceful chapter in the history of land condemnation by the Corps of Engineers.

S. W. Richardson [2] was the owner of approximately 2,259 acres of land in Tarrant County, Texas, when the Corps of Engineers began a series of surveys in 1920 to determine the feasibility of constructing and operating a dam and reservoir on his property. Six preliminary surveys followed—in 1920, 1926, 1927, 1932, 1935 and 1937—and these culminated in the Project Document of November 15, 1939, which was printed as House Document 403, 77th Congress, 1st Session (1940). The Document recommended, among other projects, the Benbrook Dam and Reservoir to be built on a small part (only 48 acres) of Mr. Richardson's land at an estimated cost of $5,205,502 (of which $483,600 was to be for land). *Neither the six survey reports, the Project Document, nor Document 403 contained any reference to recreation or recreational facilities in relation to the project.*

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[2] Mr. Richardson has since died. Petitioners, his executors, were substituted as Parties Defendants.

On March 2, 1945, Congress approved Public Law 14 (Pub. L. No. 79-14, § 2, 59 Stat. 10, App. A hereto), which provided in pertinent part:

> "Sec. 2. The following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized in the interest of national security and the stabilization of employment, and shall be prosecuted as speedily as may be consistent with budgetary requirements, under the direction of the Secretary of War and supervision of the Chief of Engineers, *in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein:*
>
> * * *
>
> The improvement of the Trinity River and tributaries, Texas, for navigation, flood control, and allied purposes is hereby approved and authorized *in accordance with the reports contained in House Document Numbered 403, Seventy-seventh Congress* * * *. [Emphasis added.]

On July 28, 1950, the United States filed in the United States District Court for the Northern District of Texas a Petition for Condemnation of 1452 acres of Mr. Richardson's land (subsequently reduced to 1207 acres, each modified taking being successively certified by the Secretary of the Army as necessary and authorized for project purposes). The subsequently filed "Declaration of Taking No. 1" was executed by then Secretary of the Army Frank Pace, Jr., and stated that the taking was authorized by Public Law 14. The United States sought not only the acres lying below el. 697.1 (or the conservation pool elevation, sometimes described as the maximum water level of the pool below flood stage) but also 647 acres above this elevation.

Mr. Richardson was not opposed to the taking below the conservation pool elevation (in fact, he offered to make a gift of that land to the United States[3]), but he did contest the Government's right to condemn the 647 acres above that elevation as unauthorized by law, arbitrary and capricious, and a denial of due process of law under the Fifth Amendment. His two principal objections that evolved out of the extended litigation that followed were: (1) the 647 acres were actually being taken for recreational use, which was not a purpose for which private property had been or could be condemned under the statutes authorizing the Benbrook Project, and (2) the Project, as built, was radically and materially changed from that authorized by Congress and had not been resubmitted to Congress as required by express statute.

After the filing of the Petition for Condemnation, Mr. Richardson instituted discovery proceedings in order to establish that the Corps of Engineers had deviated from and exceeded Congressional authority in the construction of the Dam and Reservoir and was seizing land surrounding the reservoir for unauthorized purposes. In another case, *United States* v. *Meyer*, 113 F.2d 387 (7th Cir.), *cert. denied*, 311 U.S. 706 (1940), the court had held that presumptively the Secretary of the Army and not his subordinates, even the Chief of Engineers, had made the necessary determinations underlying a condemnation. This presumption could be overturned only by taking the Secretary's deposition to discover whether or not he had in fact made the determinations himself or whether he had relied completely on his subordinates.

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[3] Finding of Fact by the District Court (App. C) (hereinafter referred to as "DC Find.") No. 52.

Upon the advice of the Justice Department (obviously because of *Meyer*), Secretary Pace refused to give his deposition or submit to discovery, despite an order of the District Court and a prior agreement to do so. Therefore, the District Court, on June 30, 1952, abated the cause with bare legal title left in the Government and possession restored to Mr. Richardson pending the Government's obedience to the court's orders. The Court of Appeals for the Fifth Circuit affirmed this action. *United States* v. *Richardson,* 204 F.2d 552 (1953).

Over ten years passed. Finally, when a prior Motion to Dismiss was reurged and Secretary Pace was replaced by Secretary Robert L. Stevens, the Government relented and submitted to discovery, including the depositions of former Secretary Pace and three members of his Corps of Engineers staff, and the production of a large amount of materials.

With these depositions and materials came the reasons, so reluctantly produced, why the Government had delayed and fought so long to prevent public access to its records. For discovery showed, as General Sturgis, Chief of the Corps, admitted to a congressional subcommittee, that "it could have been very embarrassing to have justified his [Secretary Pace's] certification of the public need of all this particular taking."[4]

As subsequently found by the District Court, disclosed in congressional hearings, or revealed by evi-

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[4] "Army-Interior Reservoir Land Acquisition Policy," Hearings before a House Subcommittee of the Committee on Government Operations, 85th Cong., 1st Sess. (1957) (hereinafter referred to as "Acquisition Policy Hearings"), p. 422. These hearings were admitted into evidence below at Vol. III, Transcript of Trial Proceedings, pp. 748, 756.

dence of record, the facts that emerged were, briefly, these:

(a) The Corps had a "field practice" prior to 1953 of taking more property than was authorized in order to create land for purely recreational purposes. The Corps did not acknowledge this fact to the public, however, until 1957. Instead, it always stated the proposed use in terms of the use authorized by Congress.[5] This was because the Corps had no authority at that time to acquire lands for recreational purposes.[6]

(b) In the instant case, despite the fact that Public Law 14 had authorized the Benbrook Project solely for "navigation, flood control, and allied purposes," the Corps within several months began drawing up secret plans for the taking of part of Mr. Richardson's land solely for recreational purposes.[7] A letter dated July 11, 1946, for example, recommended "a master plan for recreational development at the Benbrook Reservoir * * * ." This letter became Appendix VIII-E to the Definite Project Report but was the *only* Appendix stamped by the Corps "NOT FOR PUBLIC RELEASE."[8] The record contains instructions to subordinates as to how to go about acquiring land for recreational purposes; descriptions of what recreational facilities would be provided (*e.g.*, "swimming, boating, camping, picnicking"); justifications for increased costs based on "recreational development"; a letter stating that "the Corps of Engineers' plans would provide adequate

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[5] Acquisition Policy Hearings, *supra* n. 4 at 62, 126-129, 155-156.

[6] *Id.* at 55, 57, 68, 129, 193.

[7] DC Find. No. 36.

[8] DC Find. Nos. 37, 41.

public recreational areas" and that the "presently approved taking lines provide sufficient land to meet reasonable demands for recreational as well as other purposes," and numerous maps with certain areas clearly marked as recreational areas. The extent to which the Corps went to hide its true purpose is illustrated by the fact that an allocation of funds "for recreation" was deliberately changed to "preparation of master plan for reservoir management."[9] In fact, several such changes were made. One memorandum (June 6, 1950), which was referred to in a Corps letter (DX54) and which apparently bore on the subject of recreation, never was produced during discovery, the Corps claiming to have lost it.

(c) As the District Court found, recreational use was in fact the actual and only purpose of taking the land above el. 697.1 (DC Find. Nos. 39 and 56).

(d) Former Secretary Pace conceded and the District Court found that the then Secretary made no independent examination of the facts submitted to him prior to forwarding a request for condemnation (written by the Corps) to the Attorney General but instead relied entirely on those facts and accepted the Corps' recommendations without question.[10]

(e) As the District Court found (DC Find. No. 3), the Government's refusal to submit to discovery for thirteen years "was for the purpose of keeping the landowner from getting proof that the only true purpose of taking the fee simple title to the portion of

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[9] DC Find. No. 42.

[10] DC Find. Nos. 6-9; Conclusion of Law of the District Court (hereinafter referred to as "DC Con.") No. 4.

Tract B-108 above the 697.1 line was for public recreation."

(f) This "field practice" of taking more property than authorized for recreational purposes, as described in Paragraph (a) above, was specifically recognized and officially changed by Secretary of the Army Stevens in 1953 as a result of the condemnation in this very case.[11] General Sturgis testified before a congressional committee in 1957 that the reason for the change was that "there is no general authority for the Corps of Engineers to acquire land other than for basic project purposes (navigation, flood control, etc.) and access for the public." [12]

Despite all of these facts, subsequently confirmed by undisputed findings, the Government's attorney told the District Court in this case:

> I would like to correct one impression, if I left any impression with the Court that the Court might assume I said that they were acquiring some of this land for recreational purposes, I didn't mean to say that. *There is no plan for it to be used for recreational purposes.* That is not set out. The only thing they have said here is the purpose as alleged in the petition, for flood control, and to aid navigation.[13]

Little wonder that the District Court found that the Government withheld facts and acted in an arbitrary and capricious manner.[14]

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[11] Acquisition Policy Hearings, *supra* n. 4 at 126-129.

[12] *Id.* at 425.

[13] Transcript of Record filed in the Fifth Circuit on appeal from the order abating prosecution of Tract B-108 (hereinafter referred to as "Tr."), pp. 155-156 (emphasis added).

[14] 309 F.Supp. at 895; DC Find. No. 35.

The project actually built by the Corps differed radically from that approved by Congress. The dam was located 3.7 miles away from the approved site; the spillway was converted from gated to uncontrolled; the crest was changed from 672 feet to 724 feet; the top of the dam was raised by 47 feet; dead storage rose from 603 to 13,760 feet; conservation storage climbed from 30,000 to 72,000 feet; controlled storage almost doubled; and the estimated cost rose from $5,205,502 to between $14,000,000 and $16,000,000. The storm design was changed from one based on actual experience to one based on "the worst possible maximum storm that could ever occur under the worst possible situations * * * " and assumed that the reservoir would already be full to el. 710 with the outlet valve closed and inoperative (DC Find. No. 25(d); see also DC Find. Nos. 14, 18-35).

The District Court, at the conclusion of a trial without a jury, made extensive Findings of Fact and Conclusions of Law (App. C). Its ultimate conclusions, *inter alia,* were that Mr. Richardson's land above el. 697.1 had been taken for the purpose of recreation, that this purpose had not been authorized by Congress, that in addition the project actually built was so substantially different from that authorized by Congress as to be an unauthorized project, and that the taking amounted to a denial of due process.

The Court of Appeals reversed, holding that the District Court had made a determination reserved to the Congress and that the changes in the project were mere changes in design which the Corps had authority to make. However, the court did *not* find that the District Court's findings were clearly erroneous or without a substantial basis in the record.

REASONS FOR GRANTING THE WRIT

A.

The Court of Appeals for the Fifth Circuit has fashioned a new rule in condemnation cases which not only conflicts with prior rulings of this Court and other Courts of Appeals but deprives landowners of an important Fifth Amendment right.

The District Court in its Conclusions of Law Numbers 2 and 3 (App. C) clearly stated the rule under which it was deciding the case:

> 2.
>
> Under the circumstances of this case, the Secretary's stated purpose of the taking is subject to judicial review to determine if it was in truth the actual purpose.
>
> 3.
>
> The Secretary's certification of the purpose of taking cannot be used by the government as an impenetrable shield to deprive the landowner of the opportunity to show that his constitutional right of due process under the Fifth Amendment to the Constitution of the United States was being violated by an unauthorized taking of his land.

The Court of Appeals rejected this rule. It held instead that absent "pervasive deception, unreasoned decision, or will-of-the-wisp determination" by the condemning government official, a court has no authority to look behind the stated purpose of condemnation. This is so even in a case where the record clearly shows that the real purpose of condemnation was not the stated purpose and the real purpose was not authorized by the governing statute. As we point out below, the condemnation in this case fails even if this rule were

the law, because the District Court's uncontested findings fully support the conclusion that the Corps of Engineers (and consequently the Secretary of the Army, who "merely accepted their recommendations without making any reasoned decisions of his own" [15]) did engage in pervasive deception, unreasoned decision and will-of-the-wisp determinations. We submit, however, that the rule announced by the Court of Appeals is not the correct rule and violates petitioners' right under the Fifth Amendment to due process of law.

It should be noted initially that the ruling below comes at a highly significant time in the evolving law of condemnation. In 1956, the Federal Government owned about 408 million acres, or 21.4%, of the country's 1.9 billion acres.[16] In 1970, the Government owned about 755 million acres out of 2.2 billion, or 34.3%.[17] The Corps of Engineers alone administers 7,148,150 acres.[18] In 1970, the Department of Justice opened 556 new condemnation cases (an increase of 29 in three

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[15] DC Find. No. 6; see also DC Find. Nos. 7-9.

[16] Acquisition Policy Hearings, *supra* n. 4 at 148.

[17] "One Third of the Nation's Land," A Report to the President and to the Congress by the Public Land Law Review Commission (1970) (hereinafter referred to as "Commission Report"), p. x. The Report adds: "The huge expanse of the public lands of the Far West is difficult for many to comprehend. * * * More than 86 percent of the State of Nevada is owned by the Federal Government, and the public land area in that state is twice the size of the entire State of New York. * * * Minnesota, for example, has Federal public lands which exceed the area of Connecticut. In addition, there are 10 other nonwestern states in each of which the public landholdings of the Federal Government approximate or exceed the land area of the State of Delaware" (p. 22; footnote deleted).

[18] Commission Report, *supra* n. 17 at 329.

years) involving 8,598 tracts and 122,011 acres, and it also opened 17,075 new tracts for direct purchase involving 284,067 acres.[19] The cost of its condemnations and direct purchases in that single year was $162,616,-556.[20] Thus, the issues presented here are not only constantly recurring ones but ones of great national importance, for they affect thousands of landowners and the use to which millions of acres of this country's lands will be put.

Moreover, when a government body acts as the Corps of Engineers has acted here, people are bound to lose faith in those in authority. We submit that this is hardly the time for ignoring the District Court's findings that the Corps, "in its zeal to acquire excess lands for recreational use,"[21] concealed the facts,[22] changed facts for public consumption,[23] made recommendations "tainted by * * * impropriety,"[24] misstated the real purpose of its action,[25] and otherwise acted in an arbitrary and capricious manner[26] in excess of its authority.[27] The fact is that the Corps' over-reaching, inefficiency, poor planning and excessive costs have in part been exposed by the Congress and are widely recog-

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[19] Memorandum from Harold S. Harrison, Chief of Land Acquisitions Section, Department of Justice, to Assistant Attorney General Kashiwa dated January 11, 1971.

[20] *Ibid.*

[21] DC Find. No. 46.

[22] 309 F.Supp. at 895; DC Find. Nos. 37, 41.

[23] 309 F.Supp. at 896; DC Find. No. 42.

[24] DC Con. No. 4.

[25] 309 F. Supp. at 902.

[26] DC Find. No. 35.

[27] DC Con. No. 5.

nized by the public.[28] It is time for this Court to declare the role of the judiciary in putting a stop to unlawful condemnations that deny due process.

Under the Court of Appeals ruling, the District Court would have had to ignore the unequivocal, uncontested

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[28] Even the head of the Corps recognized at one point that "In response to operational instruction No. 14, my Real Estate Division, by memorandum dated May 13, 1953, of which the subcommittee has a copy, expressed the view that the corps was acquiring excessive amounts of land as evidenced by numerous protests which I have mentioned." Acquisition Policy Hearings, *supra* n. 4 at 128.

One study of all river-and-harbor and flood control projects under construction by the Corps in fiscal 1951 showed that the Corps' preliminary planning reports "did not furnish a sound basis upon which the appropriation of initial construction funds could be considered by Congress," that "A private owner could not tolerate such lack of engineering reliability without inviting bankruptcy," that "the corps' engineering planning procedures are drastically in need of overhauling and improvement before the corps should again ask Congress to commit itself to the construction of any new projects," and that "the planning of authorized projects by the Corps of Engineers, subsequent to the preliminary planning embodied in the survey report, is not adequate." "Investigation of Corps of Engineers Civil Works Program," Report of the House Subcommittee on Deficiencies and Army Civil Functions of the Committee on Appropriations, 82nd Cong., 1st Sess. (1951) (hereinafter "Investigation of Corps Report"), pp. 2, 7, 14, 15.

A more recent Report to the President and the Congress found: "The Commission is not satisfied with the manner in which land use planning is being carried out for the public lands. We find that many of the individual problems that led to the creation of this Commission and which emerged from our study program have their roots in an inadequate planning process. * * * We discovered problems caused by the lack of coordination between public land agencies in nearly every aspect of public land policy that we reviewed. Finally, we are concerned by the fact that the relative roles of Congress and the executive branch have not been clearly defined in determining land uses. The essence of land use plan-

evidence in the record as to the true purpose of the taking and to assume—squarely in the face of that evidence—that the purpose was *not* for recreation but rather whatever the Secretary said it was. We submit that it would amount to a subversion of justice for a court, on the basis of the record here, to make such a finding.

Moreover, the law does not require it. In *Catlin* v. *United States,* 324 U.S. 229 (1945), the condemnee argued that "the taking was not for a reason authorized by the War Purposes Act." In construing the provisions of 40 U.S.C. § 258a, which provides that upon the filing of a declaration of taking and a deposit, "title * * * shall vest in the United States * * * and said lands shall be deemed to be condemned and taken for the use of the United States", this Court said:

> The exact effect of these provisions is not entirely clear. *But we find nothing in the statute to indicate that Congress intended to deprive the owner of all opportunity to challenge the validity of the taking for departure from the statutory limits.*
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> * * *
>
> While the language and the wording of the act are not wholly free from doubt, we see no necessary inconsistency between the provisions for transfer of title upon filing of the declaration and making of the deposit and at the same time preserving the

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ning is found in the classification or zoning of lands for particular uses. Congress has, in many cases, set aside large areas of public lands for parks or for other purposes. But the administering agencies also determine or limit land uses through withdrawals and land classifications. We believe that the roles of both Congress and the administrative agencies must be more clearly defined so that the limits of the discretionary powers are understood by the administrators and the public" (Commission Report, *supra* n. 17 at 41, 42). See also "Dam Outrage: The Story of the Army Engineers," by Elizabeth B. Drew, The Atlantic Magazine (April 1970).

> owner's *preexisting right to question the validity of the taking as not being for a purpose authorized by the statute under which the main proceeding is brought* * * *. The alternative construction, that title passes irrevocably, leaving the owner no opportunity to question the taking's validity or one for which the only remedy would be to accept the compensation which would be just if the taking were valid, would raise serious question concerning the statute's validity.
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> * * *
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> * * * The operation of §§ 3 and 5 is to cut off the Government's right to abandon the proceedings. It is not to compel the owner to submit to *unauthorized takings*. [324 U.S. at 240-243; emphasis added.[29]]

Both the Sixth Circuit and District of Columbia Circuit Courts of Appeals have followed the *Catlin* rule and held that a landowner can challenge a taking as not being for the prescribed statutory purpose,[30] so

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[29] Respondent and the Fifth Circuit relied on *Berman* v. *Parker*, 348 U.S. 26 (1954), but that case is inapposite. No one contended there that the action by the Planning Commission in fixing the boundaries of the projects area was unauthorized, arbitrary or capricious. The sole attack was on the constitutionality of the authorizing statute. This Court held that Congress had legitimately made a determination that it was necessary to develop a plan for all of the District of Columbia and surrounding areas and had authorized the Planning Commission to determine (subject to certain conditions) which parts had to be taken for the legislative purpose. This Court should clearly distinguish the broad and unlimited congressional authorizations involved in *Berman* and such cases as *United States ex rel. T.V.A.* v. *Welch*, 327 U.S. 546 (1946), with the limited authority spelled out in statutes such as Public Law 14.

[30] *Higginson* v. *United States*, 384 F.2d 504, 507 (6th Cir. 1967); *Maiatico* v. *United States*, 302 F.2d 880, 886 (D.C. Cir. 1962). See also *Loughran* v. *United States*, 317 F.2d 896, 898-899 (D.C. Cir.

that the Fifth Circuit, by its ruling below, is in conflict with these other two circuits. (A number of District Courts have allowed similar challenges.[31]) A landowner can hardly "question the validity of the taking as not being for a purpose authorized by the statute," as this Court said in *Catlin* that he could do, if he is not allowed to inquire into what the purpose of the taking was.

The Fifth Circuit correctly stated that if Congress has declared a particular condemnation to be necessary, it is improper for a court to strike down the condemnation because in the court's eyes the condemnation is not necessary. But then the court proceeded to equate this rule with its own rule that courts cannot look behind a stated purpose to determine if it is in fact the true purpose. We believe that the court below made this error because of its assumption that "In order to find that the stated purpose was not the real purpose the [District Court] was forced to find that the land was

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1963). In *Maiatico,* for example, the landowner challenged the Government's right to take a building on the ground that the building was not within the taking area defined in the Public Buildings Act, and the taking had not been approved by the proper congressional committee. The Government countered in part that subsequent Appropriation Acts were sufficient approval of the taking. The Court of Appeals rejected this contention and allowed the landowner to test whether the taking was within the prescribed authority.

[31] *E.g., United States* v. *Three Parcels of Land,* 224 F.Supp. 873, 876 (D. Alaska 1963); *United States* v. *10.47 Acres of Land,* 218 F.Supp. 730, 733 (D. N.H. 1962); *United States* v. *44.00 Acres of Land,* 110 F.Supp. 168, 171 (W.D. N.Y. 1953); *United States* v. *40.75 Acres of Land,* 76 F.Supp. 239, 241 (N.D. Ill. 1948); *United States* v. *Woodworth,* 66 F.Supp. 641, 644 (W.D. N.Y. 1946); *United States* v. *Certain Parcels of Land,* 61 F.Supp. 164, 169 (D. Md. 1945).

not necessary to achieve that stated purpose." On the contrary, the District Court, in finding that the taking of land above el. 697.1 was unnecessary, was merely bolstering its conclusion, already well established by the record, that the purpose of the taking was not the one asserted by the Corps of Engineers.[32] Even if we were to assume that all of the District Court's findings in regard to necessity were improper and should be ignored, there remains ample, uncontradicted evidence in the record as to what the purpose of the taking was, and this evidence has nothing to do with, and is not dependent upon, any findings relating to necessity.

Here the Congress set forth the purpose of the taking, and the Government was bound by that direction.[33] The purpose was "for navigation, flood control, and

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[32] This conclusion is supported by the fact that the District Court itself quoted with approval the holding in *Maiatico* v. *United States, supra,* 302 F.2d at 886, that "Despite appellants' allegations that the taking is unnecessary, it is not for us to determine whether or not a particular project be desirable". See 309 F.Supp. at 900.

Petitioner's attorney had made it quite clear at oral argument in the discovery proceedings before the District Court what he was attempting to show: "* * * I am entitled to a finding before a court or jury as to what the true purpose is. If that purpose is unauthorized, I am entitled to show as a fact that they are not taking the land in connection with the overflow, or anything else, except to put it to an unauthorized purpose, a wholly unauthorized purpose. It is not a question of a dual purpose, it is a question of an unauthorized purpose, and that is, in itself one of the elements of arbitrary and capricious action. It is not the only one." (Tr. 200).

[33] *Hooe* v. *United States,* 218 U.S. 322, 335-336 (1910); *United States* v. *Certain Real Estate,* 217 F.2d 920, 925 (6th Cir. 1954); Investigation of Corps Report, *supra* n. 28 at 4.

allied purposes."[34] The record shows that the true purpose of the taking was for recreation. Is the judiciary powerless to recognize the unauthorized taking? Despite what we believe to be the clear answer set forth in *Catlin,* there is obviously confusion on the point in some jurisdictions—a confusion that will be compounded if the opinion below is allowed to stand. In fact, any doubt about the need for this Court to clarify the role of the judiciary is laid to rest by the various, conflicting and confusing positions taken by the Government itself in this very case.[35]

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[34] Certainly the phrase "allied purposes" cannot be used to cover recreation. Long prior to 1944, Congress authorized projects, such as Benbrook, for "flood control and allied purposes." As an example, Public Law 228, 77th Cong., 1st Sess., 1941, authorized certain propects "for flood control and allied purposes." Yet, not until Public Law 534 (78th Cong., 2d Sess. 1944) did Congress authorize recreation at any project. Obviously, therefore, the term "allied purposes" does not encompass recreational development. Nor did Public Law 534 authorize takings for recreational development at Benbrook. As shown by "Authorization for Reservoirs, Levees, and Flood Walls for Flood Control," Report No. 1309, Committee on Flood Control, 78th Cong., 2d Sess. (1944), pp 6-7, that Act gave authority for the expenditure of funds for recreational development at forty-two reservoir areas *already owned by the Government.* The Committee recognized that prior to this Act there was no authority for the Secretary to expend funds at reservoirs for recreational development. *Ibid.* Thus, recreational development was so foreign to the authorized purpose of flood control as to require an act of Congress to permit the Secretary even to devote money to reservoir areas *already owned* by the Government for such purposes.

[35] For example:

> The legislative and administrative determination of the necessity of the acquisition is not subject to judicial review in the absence of arbitrariness, capriciousness or abuse of discretion, and the mere filing of a petition for condemnation is sufficient indication of administrative finding of necessity [Objections

B

We argue above that the judiciary is allowed to test whether the true purpose of the taking is the same as the authorized purpose. Even if the Court were not

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of the United States to Defendant's Request for Admissions, Tr. 106.]

* * *

As will be shown, the relief for unwise or unreasoned (or for that matter arbitrary, capricious or bad faith) actions of a delegated agent of the Government in taking land is not judicial but political. [Memorandum in Opposition to Defendant's Motion Reurging Dismissal in the District Court, p. 5; footnote deleted.]

* * *

Some lower courts have, *in dictum,* asserted a limited power of judicial review, phrased in terms of determining whether the administrative official acted in "bad faith" or "arbitrarily or capriciously." In truth, Government counsel, in earlier cases as here, *have more or less conceded* a limited exception, no doubt secure in the thought that no bad faith could be shown. [Memorandum Opposing Defendants Motion Reurging Dismissal in the District Court, p. 11; emphasis added.]

* * *

* * * [T]he only issue in an eminent domain proceeding is just compensation. [Objections of the United States to Defendant's Request for Admissions, Tr. 103.]

* * *

2. The facts suggested for findings do not lay a foundation or constitute evidence for a finding of bad faith conduct on the part of the Secretary, should such a finding become material which is denied. [Plaintiff's Objections to Defendant's Findings of Fact and Conclusions of Law in the District Court, p. 1.]

* * *

MR. HARRIS [representing the United States]: If the action was arbitrary and capricious, it is my opinion, under the decision * * * [i]t is for the Court.

THE COURT: Does that become a matter for the courts?

MR. HARRIS: They have left that open for the courts.

THE COURT: All right.

MR. HARRIS: If the action is arbitrary. [Oral argument before the District Court in the discovery proceedings, Tr. 294-295.]

to accept that view, however, and even if the rule adopted by the Fifth Circuit prevails, the taking in this case cannot be justified. It makes no difference whether the test is "pervasive deception, unreasoned decision, or will-of-the-wisp determination", as concluded by the Fifth Circuit, or "arbitrariness, capriciousness or abuse of discretion," as sometimes argued by the Government to the District Court, the test is met in this case. The District Court found all of these elements, the record fully justifies its findings, the Government has never contested them, and simple justice requires that they be heeded.

If the Government can be allowed to act as it has here—telling the court one thing when its own records show the opposite, changing documents for public consumption or refusing to release them at all, misstating the facts, and so on—then the Court of Appeals references to such tactics as "pervasive deception" are empty rhetoric.

C

The project actually built was unauthorized for still another reason.

The radical changes between the project described in House Document 403 and approved by Congress and the project actually built have been set forth in our Statement, *supra*. The total cost, by way of example, tripled between the Document and the construction. While the Corps has been notorious for its poor planning and dramatic cost escalations,[36] the Benbrook

[36] "The Garrison project was authorized in the 1944 Flood Control Act on an authorization estimate of $105 million. That authorization estimate was predicated upon a survey report which, under the statute, was formally written by the Corps of Engineers, referred to the Board of Engineers for Rivers and Harbors, filed by

Project was an unusual one even for the Corps. Congress subsequently found that by fiscal 1952, for example, the estimated cost of relocation alone on the project had risen from $35,992 to $1,778,000—or by 4,839%—the highest percentage increase of any project studied.[37]

The Corps has admitted outside of this case that it must go back to Congress if anything other than inconsequential modifications or changes are made.[38] Yet it has insisted below that the study embodied in House Document 403 was merely a preliminary report which could thereafter be changed in the way it was here. This simply is not a fact, as the District Court found.[39]

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the Secretary of the Army with the Congress and printed. The authorization estimate in the survey report is $105 million. The estimate for fiscal year 1952 is $268 million, which is over twice as much as the authorization estimate." Investigation of Corps of Engineers Civil Works Program, Hearings before the House Subcommittee of the Committee on Appropriations, 82nd Congress, 1st Sess. (1951) (hereinafter referred to as "Investigation of Corps Hearings"), Part I, p. 11. In another project, the difference between the amount authorized by Congress, based on the Corps' survey report, was $163,000,000—almost $18,000,000 of which was accounted for by "items, which were omitted but should have been included by the estimator as distinguished from those which could not have been foreseen" (*id.* at 12). In still another project, "with the relocation program only 1 percent complete, the estimate in the survey report was 3,396 percent off" (*id.* at 26). Charts were introduced showing that costs for all projects in that year were 124 percent over the authorization estimate—from $2.6 billion to $5.9 billion (*id.* at 15-18).

[37] Investigation of Corps Hearings, *supra* n. 36, Part I, pp. 27-30.

[38] Investigation of Corps Hearings, *supra* n. 36, Part II, pp. 137-138; "Supplemental Hearings on the Civil Functions, Department of the Army, Appropriations for 1951," Senate Hearings before the Subcommittee of the Committee on Appropriations, 81st Cong., 2d Sess. (1951), p. 35.

[39] DC Find. Nos. 12, 13.

The District Engineer had already submitted six *preliminary* examination reports, and after the last of these he was directed to make a *survey* report (House Document 403, p. 11, par. 2). The resulting report was in fact made up of detailed analyses by the District Engineer, the Division Engineer, the Board of Engineers, and the Chief of Engineers.[40]

Congress authorized the construction of Benbrook "* * * in accordance with the plans in" House Document 403. Any construction of this direction except the one we urge would nullify the expressed policy of Congress that "no * * * modification not authorized, of a project * * * shall be authorized * * * unless a report for such * * * modification has been previously submitted by the Chief of Engineers * * * in conformity with existing law" (33 U.S.C. § 701b-8); would ignore the provisions of 33 U.S.C. § 701m, authorizing the Chief of Engineers to make a dam smaller "on the chosen site" but not larger; and would defeat the plain intent of Congress in requiring reports for projects or modifications to cover, among other things, "the extent and character of the area to be affected" (33

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[40] The District Engineer's report alone comprised 136 pages, plus numerous plans, drawings and specifications, and contained in minute detail data covering the location of the dam, geography, topography, geology, soils, streams, population, industries and resources, general hydrology, improvements desired by local interests, existing improvements, flood damages, plan of improvements, power, irrigation, stream pollution, relationship of the program of the Department of Agriculture to the District Engineer's proposed plan, conclusions and recommendations. The report contained a detailed economic cost/benefit ratio based upon structural design criteria for Benbrook Dam and Reservoir, including among other things, its specific location, type of construction, capacity, acreage needed and cost, cost of construction and cost of relocations of improvements.

U.S.C. § 701). The Court of Appeals neither cited nor discussed these statutory provisions. Yet absent compliance with the policies of Congress set out in these provisions, how would Congress ever have any assurance that projects or modifications are practical or economically feasible?

CONCLUSION

Petitioners do not oppose a proper, authorized taking of land for purposes of recreation. But the mere fact that recreation is to be the end use of the land does not automatically confer an exalted status upon the taking. On the contrary, a recent Report to the President and the Congress stressed that recreation policies and programs on public lands of less than national significance can be handled at the state and local level better than by the Federal Government; that some areas are being destroyed by the concentrated use, carelessness and littering associated with recreation (*e.g.*, "Motorcycle racing can grind a desert range to pulp"); that recreation use requires added police protection which federal authorities sometimes cannot provide, and other factors militating against federal control of recreation areas.[41]

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[41] Commission Report, *supra* n. 17 at 5, 199, 207, 208, 213, 215, 268-269. The Commission pointed out that it is important to keep acquisitions of land within reason "to avoid unnecessary (1) reduction of the available tax base for state and local government; (2) preemption of lands suitable for generating economic activity for non-economic purposes (recreation areas, fish and wildlife refuges, etc.); (3) disruption of existing economic activity and dislocation of residents." *Id.* at 270.

It is not without significance that on January 20, 1971, President Nixon halted further construction of the cross-Florida barge canal because it had been planned without regard to natural, ecological values.

Thus, petitioners are not opposed to recreation; they *are* opposed to secret, ill-conceived plans for recreation without proper consideration by and authority from the Congress.[42] Yet if the rule announced by the Court of Appeals in this case is adopted, the Corps, by the simple device of obtaining a declaration from whomever the Attorney General delegates[43] that the purpose of the taking is the same purpose declared by Congress, will cut off all judicial inquiry into what the Corps really has in mind for the land to be acquired. The courts will blindly have to accept such a declaration even in the face of a record like this one, where the true purpose is established. Though the record in this case goes back over twenty years, the rule announced by the Court of Appeals is new, and as noted

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[42] In this respect, we stand four-square with Secretary Stevens when in 1953 he reversed the "field practice" of taking unauthorized land for recreational purposes. General Sturgis' notes of a meeting with the Secretary stated that the Secretary "said he was not personally against recreation for the public or the acquisition for fish and wildlife, or any other purpose for the public good; but if such purposes were the intent of Congress, Congress should so express itself by general authorizing legislation." Acquisition Policy Hearings, *supra* n. 4 at 423.

[43] Under a newly-enacted statute, public money may not be expended for land purchases unless the Attorney General "gives prior written approval of the sufficiency of the title to land for the purpose for which the property is being acquired by the United States," but the Act then goes on to provide that "The Attorney General may delegate his responsibility under this section *to other departments and agencies*, subject to his general supervision and in accordance with regulations promulgated by him." Public Law 91-393, 91st Cong., Sept. 1, 1970, 84 Stat. 835 (emphasis added). This extraordinary and apparently unlimited grant of delegating authority makes all more important a review by this Court of the rule fashioned by the Court of Appeals in this case.

below (n. 43), its impact will be even more far-reaching for the future than it would have been for the past.

We respectfully submit that it is time to halt the kind of activity so colorfully described by Senator Gaylord Nelson:

> The Corps of Engineers is like that marvelous little creature, the beaver, whose instinct tells him every fall to build a dam wherever he finds a trickle of water. But at least he has a purpose—to store up some food underwater and create a livable habitat for the long winter. Like the Corps, this little animal frequently builds dams he doesn't need, but at least he doesn't ask the taxpayer to foot the bill [See Atlantic Magazine article, *supra* n. 28 at 51.]

Respectfully submitted,

R. Daniel Settle
Carlisle Cravens
1800 First National Bank Building
Fort Worth, Texas 76102

E. Barrett Prettyman, Jr.
815 Connecticut Avenue
Washington, D. C. 20006

Attorneys for Petitioners

Cantey, Hanger, Gooch, Cravens & Munn

Hogan & Hartson
Of Counsel